Supreme Court, U.S.
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In the

Supreme Court of the United States

KURT E. JOHNSON,

Petitioner,

vs.

WILLIAM E. BOYD, Warden,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE C. MARSHALL, ESQ.
Counsel of Record
Northwestern University
Law School
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-7412

ALLAN A. ACKERMAN, ESQ.
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorneys for Petitioner
Kurt E. Johnson

Midwest Law Printing Company/Photex — Chicago — (312) 321-0220

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QUESTIONS PRESENTED

Petitioner, Kurt Johnson, a pretrial detainee, was deprived of the right to be present while several potential jurors discussed whether they could be fair and impartial. Three ultimately participated as guilty-verdict rendering jurors. Petitioner's exclusion arose as a result of colloquy between the trial court and counsel, in petitioner's absence. The Court's cases hold that jury selection is a critical stage of a criminal trial, and the defendant has the right to be present during all critical stages, unless petitioner knowingly and voluntarily waives that right. The Federal circuits and State courts are divided on whether counsel can waive the defendant's right to be present during all stages of jury voir dire.

Petitioner presents the questions:

1. Whether the Federal constitution condones defense counsel's silent waiver of a defendant's right to be present during stages of jury selection where questions surrounding a juror's capacity to be fair and impartial are questioned?

2. Can a defendant being tried for first-degree murder be deprived of the right to be present and assess juror facial expressions, demeanor and subliminal responses, where the trial record fails to disclose any waiver or trial court admonitions regarding defendant's right to be present?

a) Can defendant's exclusion from critical stages of jury voir dire be the subject of harmless error balancing?

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PETITION FOR WRIT OF CERTIORARI

Kurt E. Johnson, petitioner, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on March 29, 2001 in *Kurt E. Johnson v. William E. Boyd*.

OPINION BELOW

The affirming order of the United States Court of Appeals for the Seventh Circuit is unreported and is reproduced at App. 1-7, *infra*.

JURISDICTION

The judgment of the Seventh Circuit was entered on March 29, 2001. On June 29, 2001, Justice Stevens granted an extension of time in which to file a petition for a writ of certiorari to and including August 28, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the U.S. Constitution, in part, states:

> No person shall be . . . [nor] be deprived of life, liberty or property, without due process of law
>
> . . . .

The Sixth Amendment to the U.S. Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the U.S. Constitution, in part, states:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254 (AEDPA), in pertinent part, states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. * * *

STATEMENT OF THE CASE

1. Original proceedings.

On November 17, 1993, Kurt Johnson (hereafter Johnson or petitioner), was indicted by a Will County, Illinois grand jury for first-degree murder. He was detained pending trial and represented by private counsel. His jury trial commenced in Will County, Illinois on April 24, 1995. Just prior to jury selection, *in petitioner's absence,* dialogue between the trial court and counsel disclosed the following:

> MR. BURMILA [Defense Counsel]: Thank you, Judge. Then I think we are ready to proceed.
>
> THE COURT: Okay. Now, as to the questioning, looking at something, if they were to have heard or read something about this, whether or not that would jog their memory with regards to that—
>
> MR. BURMILA: Judge, I trust the court's inquiry. If anybody says anything that I think may lead to some information, of course, that would taint the rest of the jurors.
>
> The court's *habit* has always been in the past to interview that person individually, and I certainly think Mr. McCabe and I and Ms. Devriendt would go out in the hallway and question the jury that way.

Org. Trial Tr. at 10-11 (ital. emph. added; Mr. McCabe and Ms. Devriendt were the Will County prosecutors).

During jury selection the trial court periodically met with various jurors in the presence of counsel, but in petitioner's absence. One of the verdict-rendering jurors,

Ms. Norberg, related that one of her relatives was tried in federal court and was acquitted although others in the case went to prison (Supp. Tr. of 4/24/95 at 40-42). Verdict-rendering juror, Ms. Henegar, had a cousin involved with the mafia who was jailed in Cook County, Illinois some years earlier. *Id.* at 42-43. Another verdict-rendering juror, Ms. Metoyer, related that her spouse had been arrested because of his involvement with alcohol and underage individuals at a party years earlier. *Id.* at 85-86.[1] At the conclusion of jury voir dire, the following appears of record:

> MR. BURMILA [Defense Counsel]: I just have a—I would like the record to reflect that the State used five of their six challenges to remove women from the panel.
>
> Two of the five women they removed were African American. There were three African American women in the panel.
>
> I think the State evidenced both gender and race discrimination.
>
> I have nothing else to say.
>
> MR. MCCABE [Prosecutor]: I don't believe there is a prima facie case of anything.
>
> If you note, I believe there is nine women on the jury and three men, and that is the result of the voir dire being predominantly women.

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[1] As a pretrial detainee, Johnson remained under guard in the courtroom while juror interviews were conducted in a corridor outside of the courtroom.

> So I think as a natural course of events, there is going to be more women excused than men, and that is exactly what happened.
>
> The People accepted two people of African american discent (sic), no person of Hispanic discent (sic).
>
> I don't think there is a prima facie case.
>
> THE COURT: Show the court finds that there has not been a prima facie case shown as to either gender or race bias.
>
> We will stand in recess until tomorrow at 10:30. (April 24, 1995 Orig. Rec. at 130-131).

On May 2, 1995, following summations, Johnson was convicted on the single count of first-degree murder. Jury polling confirmed that jurors Norberg, Henegar and Metoyer signed the guilty verdict (R. 739-40). On June 20, 1995, after the denial of post-trial motions, petitioner was sentenced to thirty-eight years in custody (R. 880).

Petitioner's family retained substitute counsel for direct appeal and he failed to order or cause to be transcribed the jury voir dire transcript, which included impacting segments of jury selection in petitioner's absence. On July 15, 1996, petitioner's conviction was affirmed on direct appeal, 283 Ill.App.3d 1122, 708 N.E.2d 855 (Table), and his petition for Illinois Supreme Court review was denied on October 2, 1996 (168 Ill.2d 611, 671 N.E.2d 738; unpublished).

2. **Illinois Post-Conviction proceedings.**

On March 12, 1997, petitioner sought relief pursuant to the Illinois Post-Conviction Act, 725 ILCS 5/122-1, *et*

seq. (West 1996). Within the fabric of his post-conviction submissions he advanced federal constitutional claims under Fifth, Sixth and Fourteenth Amendments by virtue of having been excluded from critical segments of jury selection, absent judicial admonitions and any on-the-record waiver of his right to be present at all critical stages of his felony criminal trial (P.C. Rec. at 204-253). Petitioner's post-conviction filing also asserted that his trial counsel (unbeknown to him) had, *sub silentio*, waived his right to be present during critical colloquy with prospective jurors (and defense counsel was not so empowered), and his attorney on direct appeal was constitutionally deficient because he *failed* to order the transcription of jury selection (which noted his absence during substantial segments of the jury selection process and *Batson*-jury challenges).[2]

The State's filing in opposition of post-conviction relief failed to challenge petitioner's post-conviction assertions regarding his right to be present, the lack of any judicial admonitions and the absence of any record-waiver [of his right to be present during all stages of jury selection] (P.C. Rec. at 253-261).

On July 15, 1997, the post-conviction court summarily dismissed petitioner's P.C. petition. Petitioner prosecuted an appeal from the summary dismissal and on April 24, 1998, the Illinois Appellate Court affirmed, 296

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[2] Johnson's position is [was] simply that since the common-law record disclosed *Batson*-gender challenges, that should have alerted appellate counsel to potential appellate issues and therefore appellate counsel was constitutionally ineffective for failing to cause to be transcribed the April 24, 1995 jury selection transcript.

Ill.App.3d 1082, 726 N.E.2d 1195 (Table). On October 6, 1998, the Illinois Supreme Court declined discretionary review, 179 Ill.2d 602, 705 N.E.2d 444 (Table), and Johnson's timely petition for writ of certiorari was denied, *Johnson v. Illinois*, 525 U.S. 1123 (1999).

3. Federal proceedings pursuant to 28 U.S.C. § 2254.

On November 24, 1999, Johnson filed his § 2254 petition (with supporting memoranda and a compendium of exhibits which included his affidavit) in the United States District Court, Chicago, Illinois (R. 1-3). On May 23, 2000, the district court entered an order dismissing the petition, but later granted a Certificate of Appealability as to the following question:

> Whether petitioner was deprived of the effective assistance of trial counsel where trial counsel, absent defendant's acquiescence, invited segments of jury voir dire to be conducted in the defendant's absence based, *inter alia*, on the trial court's "habit" of examining jurors in the absence of the accused?[3]

After briefing and oral argument, the United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal (App. 1-7, *infra*).

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[3] U.S.C.A. 7 record at R. 21.

REASONS FOR GRANTING THE PETITION

Johnson's post-conviction and § 2254 filings were supported by his *unchallenged affidavits* which included some of the following:

a) He was unaware that his attorney had any dialogue with the trial judge regarding juror questioning in his absence; and

b) Had he known of his right to be present during questions surrounding juror qualifications, he would have insisted on being present and participating with his counsel, and

c) He would have requested that his attorney use direct or peremptory challenges to strike jurors Norberg, Henegar and Metoyer because of their familiarity with the criminal system (which he felt rendered them unfair).[4]

The federal circuits and State courts are in clear conflict regarding whether an attorney can waive a custodial defendant's right to be present at all critical stages of a criminal proceeding, including jury voir dire. In addition, the circuits are divided on the question of whether the defendant's absence during the questioning of jurors regarding their qualifications to be seated as petit jurors remains *per se* error—hence not subject to harmless error balancing.

1. As a matter of first principle, it is clear that jury selection is a critical stage of the criminal proceedings. For example, in *Gomez v. United States*, 490 U.S. 858,

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[4] Segments of Johnson's § 2254 petition and supporting affidavit are reproduced at App. 8-9, *infra*.

109 S.Ct. 2237 (1989), the Court reversed various drug convictions finding that the defendant's trial proceeded in violation of the Fifth and Sixth Amendments because jury selection was held before a United States Magistrate Judge. Justice Stevens, for a unanimous Court, explained:

> Thus in affirming *voir dire* as a *critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present*, the Court wrote: "'[W]here the indictment is for a felony, the trial commences at least from the time when the work of empaneling the jury begins.'" * * * See *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965) (*voir dire* "a necessary part of trial by jury"); * * *. Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, * * *, or predisposition about the defendant's culpability, * * *. Indications that Congress likewise considers jury selection part of a felony trial may be gleaned, *inter alia*, from its passage in 1975 of the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* (1982 ed. and Supp. V), and its placement of rules pertaining to criminal petit juries in a chapter entitled "Trial." See Fed. Rules Crim. Proc. 23, 24; cf. *id.*, Rule 43(a) (requiring defendant's presence "at every stage of the trial including the impaneling of the jury").

490 U.S. at 873, 109 S.Ct. 2237 (emph. added, internal citations omitted). In response to the government's suggestion that jury selection before a magistrate was harmless, Justice Stevens, for the full Court, rejected the harmless importunings, noting:

> We find no merit to this argument. Among those basic fair trial rights that " 'can never be treated as harmless; is a defendant's "right to an impartial adjudicator, be it judge or jury."

490 U.S. at 876, 109 S.Ct. at 2248 (internal citations omitted).[5]

2. Unquestionably, a component of jury selection is the constitutional utilization of peremptory challenges.[6] The Court recently explained that the primary purpose supporting peremptory challenges includes the constitutional guarantee of trial by an impartial jury. In *United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774 (2000), the Court reversed a ruling by the Ninth Circuit which had found prejudicial error in the district court's declination to strike a juror for cause after which the defense used a peremptory challenge to strike the challenged juror. Justice Ginsburg explained the reasons for peremptory challenge perpetuation, in part:

> Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury. See, *e.g.*, *J.E.B.*, 511 U.S., at 137, n. 8, 114 S.Ct. 1419 (purpose of peremptory challenges " 'is to permit litigants to assist the government in the election of an impartial trier of fact' ") (quot-

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[5] Johnson, relying on *Gomez*, asserts that harmless error balancing has no application where the infringement of constitutional protections are found to have occurred within [the] "critical stages" of jury [voir dire] selection.

[6] Under the Equal Protection Clause a litigant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race.

> ing *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 620, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991)); *Georgia v. McCollum*, 505 U.S. 42, 57, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) (peremptory challenges are "one state-created means to the constitutional end of an impartial jury and a fair trial"); *Frazier v. United States*, 385 U.S. 497, 505, 69 S.Ct. 201. 93 L.Ed. 187 (1948) ("the right [to peremptory challenges] is given in aid of the party's interest to secure a fair and impartial jury."

528 U.S. ___, 120 S.Ct. at 782 (Souter, Scalia and Kennedy, J.J., concurring).

3. The Court has recognized that an accused has the right to appear at all trial stages where his/her absence might frustrate the fairness of the proceeding. In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975), the Court explained [that]:

> This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. * * *

422 U.S. at 819, n. 15, supporting citations omitted).

4. Presumption against Waiver: There is an encyclopedic presumption against the waiver of constitutional rights, cf., *Brookhart v. Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245 (1966) ("There is a presumption against the waiver of constitutional rights, and for a waiver to be effective

it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege.") (internal quotations and citations omitted).[7] To be sure, [a] waiver cannot be presumed from a silent record, cf., *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709 (1969) (presuming waiver from a silent record is impermissible; citing *Johnson v. Zerbst*).

5. Defense counsel could not waive petitioner's right to be present during critical stages of jury voir dire. In *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202 (1884), the Court considered an appeal from *Hopt's* murder conviction where the primary issue on appeal related to the right of the defendant to be present during all phases of his trial, including all stages of jury selection. While reversing, Justice Harlan explained:

> The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers in the selection of jurors. *The necessities of the defense may not be met by the presence of his counsel only*. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial where the indictment is for a felony, the trial commences at least from the

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[7] In accord, *Johnson v. Zerbst*, 304 U.S. 458, 464-65, 58 S.Ct. 1019 (1938) ("It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.") (int. quotation marks and n. 13 omitted).

> time when the work of impaneling the jury begins. *We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at trial.*

110 U.S. at 578, 4 S.Ct. at 204 (ital. emph. added).[8]

In *Lewis v. United States*, 146 U.S. 370, 13 S.Ct. 136 (1892), the Court reversed *Lewis'* murder conviction finding that ". . . it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be present during trial," *id.* at 137. The Court found prejudicial error in the method utilized by the trial court in connection with the exercise of jury challenges, citing *Hopt v. Utah*, *ante*.[9]

A blending of the Court's impacting decisions confirm that jury *voir dire* is a critical stage of the criminal proceeding, where peremptory challenges are constitutionally utilized, [and] the accused has the right to be present at all stages of the criminal proceeding where his or her absence *might* frustrate the fairness of the

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[8] At the time of petitioner's trial, Illinois embraced the concept of the defendant's right to be present, 725 ILCS 5/115-3(a) (A trial shall be conducted in the presence of the defendant *unless he waives the right to be present*) (West. 1994; emph. added).

[9] The continued viability of *Lewis* and *Hopt* is not subject to challenge; both were cited, with approval, by Justice Stevens, in *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. at 2246 (1989).

proceedings, and there is an undisputed presumption against the waiver of constitutional protections—and clearly established Court precedent explains that defense counsel is powerless to waive the presence of the defendant under circumstances such as those at hand. Thus, the decision below was objectively unreasonable in light of clearly established precedent.[10]

Thus, the resolution of this petition may turn on issues which have produced irreconcilably conflicting decisions from the Federal circuits and State courts. The conflicting decisions consider questions relating to whether, *inter alia,* defense counsel has the unfettered power to

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[10] In *Penry v. Johnson*, ___ U.S. ___, 121 S.Ct. 1910 (2001), the Court explained the AEDPA clauses, viz., "contrary to"/"unreasonable application." In part, the Court noted:

> A state court decision will be "contrary to" our clearly established precedent if the state court either "applies a rule that contradicts the governing law set forth in our cases," or "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.*, at 405-406, 120 S.Ct. 1495. A state court decision will be an "unreasonable application of" our clearly established precedent if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.*, at 407-408, 120 S.Ct. 1495.
>
> "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*, at 409, 120 S.Ct. 1495 . . . ."

121 S.Ct. at 1918.

deprive a [custodial] defendant of his right to fully participate in jury selection, and the application of waiver-harmless error doctrines where the record does not disclose either trial court admonitions or a record-supporting waiver by the defendant when he or she is excluded from cloistered voir dire jury questioning designed to disclose bias or hostility of potential petit jurors.

Johnson asserts that where voir dire questions are intended to search out a prospective juror's bias, hostility or disposition, he was entitled to be present and have the opportunity to assess the juror's facial expressions, demeanor and other "subliminal responses"—as part and parcel of his right to be present during stages of the trial where his absence "might frustrate" the fairness of the proceedings, *cf., New York v. Antommarchi,* 80 N.Y.2d 247, 604 N.E.2d 95, 97 (N.Y. 1992) (defendant's drug conviction reversed because defendant excluded from segments of jury voir dire where questions surrounding juror bias, hostility or disposition explored—defendant's failure to object to exclusion not fatal to constitutional claims) (supporting authorities omitted); *New York v. Davidson*, 89 N.Y.2d 881, 675 N.E.2d 1206, 1207-08 (N.Y. 1996) (same).

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6. The circuits are divided on questions surrounding whether defense counsel may waive an accused's constitutional right to be present during all stages of jury selection and, if so, what constitutes a valid waiver in

connection with the defendant's right to fully participate in jury selection. For example, the Ninth Circuit has held that it is the defendant, and not counsel, who must expressly waive his right to be present during all stages of voir dire, see *Campbell v. Wood*, 18 F.3d 662, 670-73 (9th Cir. 1994) (*en banc*), *cert. denied*, 105 S.Ct. 2169. In *Campbell*, the court held that in a capital case, the accused must *personally* waive his fundamental right to be present at every stage of the trial, including voir dire and jury empanelment. In *Campbell*, a divided *en banc* court affirmed the denial of § 2254 relief, finding that *Campbell's* express written and open-court waiver(s) of his right to be present during jury voir dire and empanelment, constituted a complete waiver in accordance with *Johnson v. Zerbst*, 18 F.3d at 671-72.

Decisions from the Second and D.C. Circuits embrace the proposition that the exclusion of the custodial defendant from segments of jury voir dire comprise *per se* error. In *United States v. Crutcher*, 405 F.2d 239, 242-44 (2d Cir. 1968), *cert. denied*, 89 S.Ct. 1018 (1969), the court held that defense counsel could not waive the defendant's right to be present during jury voir dire and empanelment, absent the defendant's clear consent, 405 F.2d at 243-44. The court further held that defendant's silence will operate as a waiver of his right to be present at the empaneling of the jury *only if he was advised of that right* (emph. added; Friendly, J., concurring). *Crutcher* was cited with approval in *United States v. Gordon*, 829 F.3d 119 (D.C. Cir. 1987). In *Gordon*, defense counsel requested that the trial court excuse the defendant from jury voir dire and empanelment because the defendant was in a holding cell, changing from prison garb to street clothing, and defense counsel—"as a tactical matter"—did not want the jurors to view the

defendant in custody. Absent trial court consultation or admonition(s), the trial court agreed.

Post-conviction, *Gordon* sought conviction vacation based on his absence during jury voir dire. The district court, finding "no prejudice," denied relief. A divided panel reversed finding the defendant's right to be present as "rooted" in the Sixth Amendment, as well as the Due Process Clause, was thwarted in that ". . . *Gordon's* presence at jury selection had a "reasonably substantial" relation to his "opportunity to defend against the charge," 829 F.2d at 124 (supporting citations omitted). The *Gordon* majority cited *Crutcher* for the proposition that *Gordon's* waiver was a personal right that could be waived only by the accused after a personal "on-the-record" waiver. *Id.* at 124.

The Fourth Circuit's decisions are in conflict. Originally, following the *Crutcher-Gordon* prejudice *per se* reasoning, in *United v. Camacho*, 955 F.2d 950 (4th Cir. 1992), the court, via *plain error*, held that the district court's empanelment of a jury in *Camacho's* absence was plain error, *albeit Camacho's* counsel did not object to jury selection and empanelment in his absence. The facts in *Camacho* revealed that he arrived for his trial several hours late because of a heavy snow-storm. The trial court had waited some fifteen-minutes and when he had not arrived, jury voir dire and empanelment ensued, *id.* at 952. The reversing panel, citing *Gordon* and *Crutcher*, declined to decide whether a defendant's complete absence from voir dire could ever be treated as harmless error. But the court went on to note, "We are in accord with the District of Columbia Circuit Court of Appeals' treatment of this issue: We need not, however, decide whether such error can ever be harmless; it is enough to find on the facts of this case that it was not . . .," *id.* at

955.[11] In *United States v. Hanno*, 21 F.3d 42, 47 (4th Cir. 1994), the court reviewed the defendant's right to be present and participate, *vis-a-vis*, jury selection and reversed drug related convictions because of jury selection improprieties. Mr. *Hanno* was present with counsel during jury selection on July 20, 1992. After the jury was empaneled, they were released because *Hanno's* trial was to commence on July 27, 1992. On that date, *Hanno* and his counsel learned that *Hanno's* jury had been dismembered and six of the *Hanno* jurors had been used in another case. The jury dismemberment was without notice to *Hanno* or his counsel. Absent objection, additional jurors were selected. *Hanno* was ultimately convicted of drug related offenses. The Fourth Circuit, on plain error review, reversed:

> The court in *Lewis* followed the case of *Hopt v. Utah*, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), in which it held that the trial of the challenges to jurors for cause conducted out of the presence of the prisoner and his attorney was reversible error, even though not objected to. This decision, like the decision in *Lewis*, was based upon the constitutional requirement of the presence of the accused. *The Court found that a proceeding to ascertain the bias of jurors outside*

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[11] The *Camacho* panel, cited with approval, *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332 (1934) (the absent defendant is denied the opportunity to give advice or suggestions to his lawyer concerning potential jurors) and *Lewis v. United States*, 146 U.S. 370, 378, 13 S.Ct. 136, 139 (1892) (a defendant's presence is also necessary so that he may effectively exercise his peremptory challenges, a process that is essential to an impartial trial).

> *the presence of the accused was one "which involves his substantial rights." 110 U.S. at 578, 4 S.Ct. at 204. * * * Thus it has been authoritatively decided that jury selection is a critical stage of a criminal trial and that the presence of the accused is required. Hopt even held that the presence of the accused could not be waived by failure to object.*

21 F.3d at 47 (ital. emph. added).

However, the Fourth Circuit recently infused harmless error as an analytical component in similar circumstances. In *United States v. Rolle*, 204 F.3d 133, 138-40 (4th Cir. 2000), the court considered the Fifth and Sixth Amendments, along with Rule 43(a), Fed.R.Crim.Proc., while evaluating *Rolle's plain-error* appellate contention that his absence from jury voir dire segments comprise[d] constitutional error. The court affirmed *Rolle's* drug conviction, explaining:

> In sum, we conclude that the exclusion of *Rolle* from an important portion of his criminal trial—the individual voir dire of twelve members of the prospective jury panel—was a violation of his constitutionally-grounded Rule 43 right to be present, and therefore constitutes "error" that is "plain." However, because Rolle is unable to demonstrate that his absence from these voir dire proceedings affected his "substantial rights," there is no reversible error to be found.

204 F.3d at 141. Thus, the Fourth Circuit has, on the one hand, found *per se* error where the defendant is excluded from segments of jury selection absent harmless error balancing (*Camacho* and *Hanno*), but in *Rolle* found no reversible error because his absence did not

affect [his] substantial rights. Hence, the Fourth Circuit precedent is unsettled and conflicting.

The Second Circuit, following *Crutcher*, remanded a drug conviction in *United States v. Hernandez*, 873 F.2d 516 (2d Cir. 1989). In *Hernandez,* the court noted that segments of jury selection went forward in his absence and remanded *Hernandez'* drug conviction, to determine whether the defendant was voluntarily absent during jury voir dire and empanelment. The court, citing *Crutcher*, explained:

> In *Crutcher*, this court indicated that the absence of a defendant during the empaneling of the jury—if not knowing and voluntary—may be an error that "can never be treated as harmless error." 405 F.2d at 244 (citation omitted). A number of courts, both within and without this Circuit have since wrestled with whether *Crutcher* should be read to mean that the absence of a defendant during voir dire of the jury is, if not knowing and voluntary, *per se* reversible error. *See Gordon*, 829 F.2d at 127 (D.C. Cir.) (*Crutcher* read to mean that defendant's absence was *per se* a reversible error); *United States v. Alesandrello*, 637 F.2d 131, 139 & n. 12 (3d Cir. 1980) (distinguishing *Crutcher*), *cert. denied*, 451 U.S. 949, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981); *United States v. Toliver*, 541 F.2d 958, 964 (2d Cir. 1978) (*Crutcher* might create *per se* rule); *United States v. Dioguardi*, 428 F.2d 1033, 1039 (2d Cir.) (not improper to hold part of voir dire outside defendants' hearing; defendants did not object), *cert. denied*, 400 U.S. 825, 91 S.Ct. 50, 27 L.Ed.2d 54 (1970); see also, 3 A. C. Wright, *Federal Practice and Procedure* § 721, at 7 n.9 (1982).

873 F.2d at 519.[12] However, post-*Hernandez*, the Second Circuit, has found an *implied* waiver in *Cardinal v. Gorczyk*, 81 F.3d 18 (2d Cir. 1996) (vacating § 2254 relief where the defendant fully participated in jury selection during his first trial, he could not assert partial jury selection exclusion where his attorney directed him not to participate during the individual voir dire of prospective jurors; the court found an implied or inferred waiver) (distinguishing *United States v. Crutcher*, 81 F.3d at 20).

The Court of Appeals for the Sixth Circuit recently considered the defendant's right to be present for a peremptory challenge conference. In *United States v. Gibbs*, 182 F.3d 408 (6th Cir. 1999) (on rehearing), the court considered bifurcated jury selection issues. After general voir dire questions, ten prospective jurors were separately questioned. Defense counsel objected to the absence of the defendant during the separate questioning, but the district court overruled the objection, *id.* at 436. Thereafter the district court conducted a peremptory challenge conference absent the defendant, but ex-

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[12] Johnson notes that some States, including New York, hold that it is *per se* error to exclude the defendant from impacting (*in camera* or bench conference) segments of jury voir dire questioning, *cf., New York v. Antommarchi,* 80 N.Y.2d 247, 604 N.E.2d 95, 97 (N.Y. 1992) (defendant's drug conviction reversed because defendant excluded from segments of jury voir dire where questions surrounding juror bias, hostility or disposition explored—defendant's failure to object to exclusion not fatal to constitutional claims—citing Sixth and Fourteenth Amendments) (supporting authorities omitted); *New York v. Davidson*, 89 N.Y.2d 881, 675 N.E.2d 1206, 1207-08 (N.Y. 1996) (same).

plained that if defense counsel insisted, the defendant could be present. *Id.* The defense voiced no objection to the method the district court conducted the peremptory conference challenge. On direct appeal, the court considered the Fifth Amendment and Fed.R.Crim.P. Rule 43, in connection with appellate challenges regarding jury selection. The court affirmed, finding that both harmless and plain error precluded relief. In connection with the "objected-to" segments of jury questioning—in the absence of the defendants—the court simply found harmless error (noting that the government met its harmless-beyond-a-reasonable-doubt standard; *id.* at 438). In connection with the defendant's absence when the peremptory challenges were made, the defendant fail to make a specific showing of prejudice resulting from "this error," *id.* at 438.[13]

On the other hand, the Tenth Circuit, in *Larson v. Tansy*, 911 F.2d 392 (10th Cir. 1990), suggests that defense counsel cannot waive a defendant's right of presence. In *Larson*, the defendant tried to commit suicide prior to trial, and at the conclusion of testimony, the trial court told defense counsel that the defendant could leave the courtroom if counsel waived his presence. The defendant was absent from trial during jury instructions, summation and the rendering of the verdict. On § 2254, defendant claimed that he was never asked if he wanted to leave and never authorized a waiver. While

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[13] The *Gibbs* panel cited to *United States v. Camacho* and *United States v. Gordon*, but, while considering the defendant's absence from the peremptory challenge conference, found that the plain error standard was unavailing. Interestingly, both *Gordon* and *Camacho* granted relief, plain error notwithstanding.

ordering that defendant be tried anew, the court explained that:

> Several courts have held that a defendant in custody can never waive his right of presence because he does not have control over his presence or absence. See *Diaz v. United States*, 223 U.S. 442, 455, 32 S.Ct. 250, 253, 56 L.Ed. 500 (1912); *Fontanez*, 878 F.2d at 36; *Gordon*, 829 F.2d at 125, n. 7; *United States v. Gregorio*, 497 F.2d 1253, 1257, n. 3 (4th Cir.), *cert. denied*, 419 U.S. 1024, 95 S.Ct. 501, 42 L.Ed.2d 298 (1974); *Bustamante v. Eyman*, 456 F.2d 269, 273-74 (9th Cir. 1972). We recognize that there may be times when a defendant in custody could waive his right to be present. However, it is certainly more difficult to establish that a defendant in custody has waived his right to be present.

911 F.2d at 397.

The Eleventh Circuit recently held that the defendant's absence, over objection, from segments of jury voir dire fail to rise to the level of prejudicial error. In *United States v. Cuchet*, 197 F.3d 1318, 1320-21 (11th Cir. 1999), the court held that while the defendant had the right to be present during every stage of trial, nonetheless, the presence and participation of defense counsel during bench-jury-questioning, satisfied Rule 43 and in light of the overwhelming evidence of guilt, the error was harmless, *id.* at 1321.[14]

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[14] In *Cuchet*, at n. 6, the panel pretermitted consideration of whether the harmless-beyond-a-reasonable-doubt standard applied because it was not briefed by appellate counsel.

It reasonably appears that the D.C. Circuit, along with the Second, Fourth and Tenth Circuits, embrace the Court's decision regarding the defendant's right to be present and fully participate in all segments of jury selection (although the Second and Fourth Circuits may have marginally backtracked). On the other hand, the balance of the Federal circuits employ a waiver/harmless error analysis when considering the same subject matter (including the Seventh Circuit in the case at hand).

The State of New York holds that defendant-exclusion from segments of jury selection where questions surround possible jury bias, hostility or disposition rises to the level of *per se* error while Illinois employs a waiver analysis depending upon whether defense counsel objected to the defendant's exclusion, *cf., Illinois v. Bennett*, 282 Ill.App.3d 975, 669 N.E.2d 717 (1996) (*per se* reversal where defense counsel objected to defendant's exclusion) -vs- *Illinois v. Starks*, 287 Ill.App.3d 1035, 679 N.E.2d 764 (1997) (same issue-plain error-conviction affirmed because no prejudice demonstrated).

This case provides an appropriate vehicle to answer the significant constitutional questions surrounding the defendant's right to be present at all critical stages of the criminal proceeding. The accused must have the opportunity to view the jurors face-to-face, while they discuss their potential prejudice or hostility toward the defendant. The Court's cases collectively embrace the proposition that the accused has every right to fully

participate in all segments of jury voir dire. Yet the Federal circuits and States are clearly divided on the remedies flowing from that deprivation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

LAWRENCE C. MARSHALL, ESQ.
Counsel of Record
Northwestern University
Law School
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-7412

ALLAN A. ACKERMAN, ESQ.
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorneys for Petitioner
Kurt E. Johnson

APPENDICES

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued March 7, 2001

Decided March 29, 2001

Before

Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

KURT E. JOHNSON,

Petitioner-Appellant,

No. 00-2892 v.

WILLIAM E. BOYD,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 99 C 7634

James B. Zagel, *Judge.*

ORDER

During jury selection at Kurt Johnson's state murder trial, the court, with counsel's consent, conducted portions of the voir dire process in the hallway. Johnson was not present at the time, nor did he personally agree to this procedure. He now contends that his exclusion from portions of voir dire violated his due process rights and that he is entitled to a new trial. Furthermore, he

claims that trial counsel's failure to object to the unconventional voir dire procedure, and appellate counsel's failure to raise the issue on direct appeal, violated his Sixth Amendment rights. We affirm the district court judgment denying Johnson collateral relief. We also deny Johnson's request to expand the district court's certificate of appealability.

In 1993, Johnson shot and killed Michael Beshoar, the new boyfriend of Johnson's former girlfriend. The only issue at trial was Johnson's intent: he claimed self defense, but the jury convicted him of first-degree murder. The Will County, Illinois, circuit court sentenced him to 38 years in prison.

Johnson's trial judge habitually engaged in the practice of questioning potential jurors who revealed a possible basis for a cause challenge in the hallway outside his courtroom and outside the presence of defendants. Johnson's attorney expressly consented to this procedure, noting that it avoided the possibility of tainting the entire venire with prejudicial information possessed by a single candidate. Johnson himself was not present in the hallway for the questioning, nor was he advised that he had a right to be present, nor did he specifically indicate that he was consenting to this procedure. In the end, three members of the eventual jury that sat in his case had been subjected to this form of *in camera* questioning, and Johnson claims that, had he known what was said, he would have asked his lawyer to challenge at least two (Jurors Norberg and Henegar) for cause. Johnson's conviction was affirmed on direct appeal.

We will coin the phrase "hallway voir dire" to describe what happened, as that is what the parties have called it (even though we have not been able to locate other published decisions that use this terminology). On post-conviction review, the Illinois Court of Appeals held that Johnson's hallway voir dire claim was waived because he did not raise it on direct appeal. It noted further that counsel's express acquiescence to hallway voir dire reflected a legitimate strategic goal—namely, to avoid prejudicing the jury venire when individual potential jurors admitted to prior knowledge of the case from pretrial publicity—and, for this reason, Johnson could not show ineffective assistance. Reviewing Johnson's petition for federal habeas corpus relief under 28 U.S.C. § 2254, the district court concluded that Johnson procedurally defaulted his hallway voir dire claim and that the state court's judgment regarding the ineffective assistance claim was not contrary to, or an unreasonable application of, federal law. It accordingly denied Johnson's petition. The district court did, however, grant Johnson a certificate of appealability limited to his ineffective assistance of counsel claim.

In order to decide whether the district court correctly rejected Johnson's claim of ineffective assistance of counsel, we must first consider the underlying defects in counsel's performance about which Johnson is complaining. Everyone agrees that Johnson's trial counsel said that he was waiving Johnson's right to be present during the portions of voir dire that took place in the hallway. The question, therefore, is whether a defendant's right to be present during the entire voir dire is, as Johnson argues, one of the small number of personal rights that

the defendant himself must knowingly and explicitly waive, or if on the other hand it is a right that counsel is entitled to waive on the defendant's behalf. The Supreme Court has thus far identified only four personal rights that a defendant has the exclusive authority to waive: the right to a trial, the right to a jury, the right to testify, and the right to represent oneself. *Jones v. Barnes,* 463 U.S. 745, 751 (1983). With respect to many other rights, whether constitutional or statutory, the Court has held that "waiver may be effected by action of counsel." *New York v. Hill,* 528 U.S. 110, 114 (2000).

In *United States v. Boyd,* 86 F.3d 719 (7th Cir. 1996), this court firmly placed "[decisions on selection of a jury . . . among the many entrusted to counsel rather than to defendants personally." *Id.* at 723; see also *United States v. Gagnon,* 470 U.S. 522, 526 (1985) (holding that the Due Process Clause does not entitle a defendant personally to attend a conference with a juror who was concerned about the defendant's sketching a picture of him; counsel's presence was sufficient). The federal appeals courts that have addressed the issue of counsel's acquiescence to conducting portions of jury voir dire outside a defendant's presence take a consistent position. These courts have held that counsel's acquiescence forfeits any objection to that process. See *United States v. Rolle,* 204 F.3d 133, 138 (4th Cir. 2000); *United States v. Gibbs,* 182 F.3d 408, 437 (6th Cir. 1999) ("No objection was registered with respect to the exercise of peremptory challenges in the jury room in the absence of the defendants, however, and we therefore review this issue for plain error."); *United States v. Tipton,* 90 F.3d 861, 874 (4th

Cir. 1996); *United States v. Diguardi,* 428 F.2d 1033, 1039 (2d Cir. 1970).

Johnson urges us to find that "critical stage" analysis requires a different result, but we disagree. As noted by the district court, critical stage analysis pertains to when a defendant is entitled to the assistance of counsel and not to whether the right protected by counsel is personal to the defendant. Johnson indisputably was entitled to counsel during voir dire and in fact was represented by counsel at that stage in his criminal proceedings.

For these reasons, we conclude that Johnson's attorney had the power to waive Johnson's presence during portions of voir dire, and, as we have already noted, it is undisputed that counsel did so. Returning to the issue on which the certificate of appealability was granted, we conclude that Johnson has not shown a Sixth Amendment violation under these circumstances. First, counsel was doing nothing outside the permissible scope of his responsibility. Second, as the state court reasonably found, Johnson did not establish deficient performance by counsel because counsel's decision was strategic—he wanted to avoid the possibility of a single potential juror's prejudicial knowledge tainting the entire venire. *United States v. Pergler,* 223 F.3d 1005, 1009 (7th Cir. 2000) ("When reviewing ineffective assistance of counsel claims, we presume that the attorneys made reasonable judgments and decline to second guess strategic choices.").

Finally, Johnson claims that his appellate counsel was ineffective for failing to raise his hallway voir dire claim

on direct appeal because *People v. Bennett,* 669 N.E.2d 717 (Ill. App. Ct. 1996), declared the practice invalid under the Illinois Constitution. There are two problems with this argument. First, *Bennett* was decided on August 16, 1996, one month after the appellate court affirmed Johnson's conviction and sentence. The Constitution does not require attorneys to be prescient. Accordingly, Johnson has not shown deficient performance by appellate counsel. Second, the *Bennett* defendant raised an objection to the practice of hallway voir dire, whereas Johnson did not. The same court that decided *Bennett* later decided *People v. Starks,* 679 N.E.2d 764 (Ill. App. Ct. 1997), holding that defendants who did not object to hallway voir dire forfeited their claims and are required to show plain error to obtain relief. This is precisely how Johnson's post-conviction court treated his claim and, thus, he cannot show that counsel's alleged error prejudiced him.

For these reasons, we AFFIRM the district court judgment. Additionally, Johnson has not made a substantial showing of the denial of his constitutional rights with regard to his *Batson* claim. Accordingly, we DENY his request to expand the certificate of appealability issued by the district court.

App. 7

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 29, 2001

BEFORE: Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*
Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 00-2892

KURT E. JOHNSON,

Petitioner-Appellant,

v.

WILLIAM E. BOYD, Warden,

Respondent-Appellee.

Appeal from the United District Court for the
Northern District of Illinois, Eastern Division.
No. 99 C 7634, James B. Zagel, Judge.

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

Johnson's verified § 2254:

> Petitioner was not aware of his right to be present, [was] never advised of his right to be present and did not waive his right to be present at this critical stage of his trial.

R. 1, § 2254 at ¶ 12A-Ground One.

Johnson's verified § 2254:

> Trial counsel was ineffective for waiving petitioner's right to be present during all critical jury trial stages including the *in camera* jury selection proceedings. Trial counsel did not advise petitioner of his absolute right to be present during all jury questioning and trial counsel could not enter into an agreement purporting to waive petitioner's right to be present without petitioner knowingly and voluntarily acceding to that process. In point of fact, trial counsel never advised petitioner of his right to be present during the in camera jury questioning. Additionally, trial counsel did not assert this fundamental constitutional error in petitioner's post-trial motion (see supporting memorandum, exhibits and affidavits).

R. 1, § 2254 at ¶ 12-Ground Two.

Johnson's unchallenged affidavit in support of § 2254 relief (USCA 7 Exhibit Volume 1 at Tab 5) explained, *inter alia*:

> I was never told that I had the right to be present at all stages of jury selection, including conferences between the judge, the lawyers and potential jurors which took place in a corridor outside of the courtroom where I was seated un-

der guard by at least two and sometimes three Will County Deputy Sheriffs. Any time I entered the courtroom each of the three would tell me exactly where to sit, and after I was seated I was specifically told not to move, at all, from where I was deposited.

One of the three deputy sheriffs would then walk over to the doorway of the courtroom and guard the corridor doors (where the prospective jurors went in and out during questioning). When I was brought into the courtroom under guard, even though jurors were not present, the trial judge and lawyers were usually already arguing some or another issue (in other words, there were discussions between the judge and lawyers both before and during the time it took to bring me, handcuffed, into the courtroom). Also, neither Judge White, nor Mr. Burmila, nor anyone else explained, in open court or otherwise, that I had the right to be present while jurors were removed from the courtroom to be questioned individually. Had I been aware of my right to be present, I would have insisted on exercising my right to be present. Had I known what was going on, I certainly would have demanded that Mr. Burmila challenge jurors Norberg and Henegar because both had family members who were involved in the criminal justice system and both acknowledged that some individuals went to prison. Juror Norberg additionally related that she must have heard about the case or read about the case.

* * * * * *

> A simple example of how ineffective my trial and appellate lawyers were can be seen from *People of the State of Illinois v. Bennett*, 282 Ill.App.3d 975, 669 N.E.2d 717 (1996). *Bennett* was decided a few weeks after my conviction was affirmed, and Mr. Bennett was granted a new trial because the same trial judge (Judge White) did the same thing (questioned jurors in Mr. Bennett's absence). However, unlike my trial lawyer, Mr. Bennett's lawyer complained of Judge White allowing jury questioning in Mr. Bennett's absence. The appellate court agreed and Mr. *Bennett* was granted a new trial on his attempt first-degree murder charge. Not only did my trial lawyer either agree or invite the questioning of jurors in my absence, without my knowledge or consent, but my appellate lawyer never raised any jury related issues in either the appellate court or Illinois Supreme Court even though *Bennett* was decided before my lawyer petitioned the Illinois Supreme Court for review.

Johnson's affidavit (in pertinent part) at ¶s 3 and 6 (R. 3, Tab 5 at ¶s 3 and 6; USCA 7 Exhibit Volume 1 at Tab 5).